No. 84-262

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress, in a section of a now obsolete statute addressed solely to the Pueblo Indians of New Mexico that was intended to reaffirm Congress' exclusive control over conveyances of Indian land as embodied in the Indian Non-Intercourse Act, empower the Secretary of the Interior unconditionally to approve conveyances of Pueblo land of unlimited scope?

2. Can a voluntary dismissal of a non-appearing defendant, for reasons unrelated to the merits of the action and necessarily without prejudice, be interposed as bar to judicial inquiry into the legal effect of the circumstances that led to the voluntary dismissal?

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STATEMENT OF THE CASE

This proceeding involves the proper interpretation of one section of a now obsolete statute passed in 1924 by Congress to deal with a temporary problem concerning certain lands of the Pueblo Indians of New Mexico. The relevant section, Section 17 of the Pueblo Lands

(never codified), was explicitly intended by Congress to reaffirm the applicability of the principles of the Indian Non-Intercourse Act (now codified at 25 U.S.C. §177) to the lands of the Pueblo Indians. Shortly after it was enacted, however, a lawyer acting on behalf of a small railroad that had built a line across Pueblo land without a valid right-of-way persuaded local federal officials that Section 17 could be read as a grant of authority to the Secretary of the Interior to approve rights-of-way over Pueblo lands, rather than as the restriction on conveyances that Congress intended it to be. This interpretation, reached as an accommodation of a financially troubled company, was followed as a way of validating several other invalid rights-of-way (including that involved in the instant case) during the next few years, as it was not until 1928 that Congress enacted proper authority for

rights-of-way over Pueblo lands. Act of April 21, 1928, 45 Stat. 442 (now codified at 25 U.S.C. §322).

The telephone line at issue in this proceeding was constructed over land of respondent Pueblo of Santa Ana (hereinafter, "Santa Ana"), a federally recognized Indian tribe, in 1905 by a predecessor of petitioner Mountain States Telephone and Telegraph Co. (hereinafter, "Mountain Bell"), without authority from the United States or the consent of Santa Ana. When, in 1927, the United States sued to quiet Santa Ana's title to its lands under the procedures of the Pueblo Lands Act, Mountain Bell was named as one of many defendants, because of its lack of any valid right-of-way. Mountain Bell never answered or appeared in the case. Rather, it did as other companies had done at the time, and obtained approval by the Secretary under Section 17 of a right-of-way to which it had obtained the

Pueblo's agreement, following which the United States Attorney voluntarily dismissed it from the suit.

The instant action was brought to challenge the validity of that right-of-way. Mountain Bell argued below that Section 17 constituted a general grant of authority to the Secretary to approve any type of conveyance of Pueblo lands, and that regardless, Mountain Bell's voluntary dismissal from United States v. Brown, No. 1814 Equity (D.N.M., decree entered May 31, 1929) precluded any inquiry into the validity of the right-of-way. The district court and the court of appeals, both of which have long experience and expertise in cases concerning the often unique legal issues affecting the New Mexico Pueblo Indians, agreed that the interpretation of Section 17 advanced by Mountain Bell was utterly contrary to its clear language and the intent of Congress, and that a voluntary

dismissal cannot have preclusive effect under the facts of this case. Mountain Bell now seeks to bring this rather inconsequential question before this Court, asserting reasons that have no basis in fact or law.

SUMMARY OF ARGUMENT

Section 17 was intended only to reaffirm the applicability of the Indian Non-Intercourse Act to the Pueblo Indians. It was never meant to be a grant of authority to the Secretary to approve conveyances, and such an interpretation is at variance with the language of the section, the language of other laws that do grant such authority, and the fact that Congress soon afterwards acted twice to provide for acquisition of rights-of-way over Pueblo lands. There is no "consistent administrative practice" supporting Mountain Bell's position: resort to Section 17 was actually brief

and sporadic. Mountain Bell's voluntary dismissal from United States v. Brown is entitled to no preclusive effect. It was not a consent decree or an adjudication on the merits, and under settled law it was without prejudice. The decisions below to this effect raise no important or novel issues of federal law requiring this Court's attention, conflict with no decisions of this Court or other courts of appeals, and are manifestly correct. Finally, while of some importance to respondent and a few other Pueblos, and to the handful of companies still using easements purportedly approved under Section 17, the decisions below are of utterly no consequence to anyone else, as the statute is now obsolete. This entire dispute is, indeed, primarily of historical interest.

ARGUMENT

I. The Interpretation Of Section 17 Reached By Both Courts Below Is Clearly Correct, Consistent With The Purposes Of The Pueblo Lands Act And The Non-Intercourse Act, And Not Worthy Of Review By This Court.

Both courts below held that Section 17 of the Pueblo Lands Act is merely what it appears to be, a reaffirmation by Congress that Pueblo lands are fully protected by the special federal legal doctrines applicable to Indian lands[1], and that the

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[1] The special status accorded Indian land by virtue of the federal trusteeship has been often noted by this Court. The principal decisions include Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). As to Pueblo land, the lead case is United States v. Candelaria, 271 U.S. 432 (1926). In general, the cases hold that Indian land is held by the United States in trust for Indian

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extraordinary exceptions to those doctrines embodied in that Act were a one-time act of grace for non-Indians who had settled on Pueblo lands unlawfully.[2]

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people (or, as in the case of the Pueblos, owned by the Pueblos subject to a restriction on alienation), and that no interest in such lands may be lost, transferred or conveyed without express authority from Congress. Since the early days of the republic, this doctrine, derived from rules of international law, has been embodied in federal statutory law, now codified at 25 U.S.C. §177, the so-called "Non-Intercourse Act." See generally, Felix Cohen's Handbook of Federal Indian Law (1982 ed.) [hereinafter "Cohen"], at 508-522.

[2] The situation arose out of uncertainty over whether Pueblo lands were indeed "Indian" lands within the meaning of federal Indian law. In United States v. Sandoval, 231 U.S. 28 (1913), this Court clearly held that the Pueblos were Indians, although the case did not address the issue of alienation of land. Prior to that decision, thousands of non-Indians had occupied Pueblo lands. Anticipating that after Sandoval, their occupancy would be held to be invalid, and that these persons would be evicted, Congress in 1921 began consideration of a means of validating their possessory rights. The focus of a storm of controversy in New Mexico and among pro-Indian interests for three years, the process finally led

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Mountain Bell's strident and often contrived argument that these rulings are bizarre departures from settled law will not wash; rather, the record shows that the resort to Section 17 as authority to approve rights-of-way was the departure. The idea that Section 17 could be viewed as a grant of power originated with Chicago bond lawyer Melvin Hawley, who prevailed upon government lawyers in New Mexico, and eventually the Commissioner of Indian Affairs, all of whom were anxious to avoid financial difficulty and public embarrassment for the various railroads and utilities that had constructed lines over Pueblo lands without lawful

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to enactment of the Pueblo Lands Act, 42 Stat. 636 (1924). See Pet.App. 16-18. Section 17 of the Act set forth what had been implied in Sandoval, and which this Court expressly affirmed - without reference to the Pueblo Lands Act - in United States v. Candelaria, 271 U.S. 432 (1926), that any alienation of Pueblo land without the express approval of Congress was void.

authority.[3] It is this bizarre interpretation, fabricated by interests seeking to avoid accountability to the Pueblos, that Mountain Bell now asks this Court to enshrine.

Section 17 states:

> 17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Clearly, the section has two parts, joined by the conjunctive "and".[4] Mountain Bell claims that only its interpretation of the section gives proper meaning to both clauses, but that interpretation has no support in the explanation of the section's meaning given by the author of the language. Francis C.

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3 There is extensive correspondence documenting these facts in government archives. While not necessary to the decisions of the courts below, they refute Mountain Bell's arguments in its petition herein as to whether the decisions below are consistent with decisions of this Court and with "established construction" of Section 17 by the Department of the Interior. For that reason, Santa Ana has included in the appendix to this brief, at App. 1, one of the principal letters, from George A. H. Fraser, Special Assistant to the Attorney General, who represented the United States in the Pueblo Lands Act cases, to the Attorney General, in which Mr. Fraser describes the meeting at which at which this interpretation was arrived at, as well as his own doubts on the subject. George A. H. Fraser to Attorney General, February 27, 1926, National Archives, Rec. Grp. 60, file 210663, sub. 2.

4 Mountain Bell makes much of the significance of the comma located in front of the "and", Pet. at 10, n. 1, arguing that its presence supports the contention that the two clauses are independent, not dependent. Given the bulk and complexity of the first clause, however, it is apparent that the section as a whole would be unreadable without the comma. It is highly doubtful that the comma's presence can be relied on for any particular interpretation of the section, and the court below made no reference to it.

Wilson had been Special United States Attorney for the Pueblos, and was deeply involved in the protracted debates, in Congress and out, over the Pueblo Lands Act. In late 1923 he proposed several changes in the bill including three new sections, one of which, almost alone among provisions of this much-revised bill, was ultimately enacted without dispute in the very language in which it was originally drafted. That was Section 17. In a letter to Indian Affairs Commissioner Charles Burke on December 18, 1923, Wilson stated that Section 17 was intended to "prevent existing conditions [i.e., the unauthorized occupancy of Pueblo lands by non-Indians] from recurring or existing again," and to "cover the same ground as Section 2116 of the Revised Statutes [the Non-Intercourse Act, now 25 U.S.C. §177] but ... changed so as to accord with the

conditions of the Pueblo Indians."[5]

A careful examination of Section 17 shows that that is just what it does. Like the Non-Intercourse Act, it specifies that no interest may be acquired in the lands of any Pueblo "except as may hereafter be provided by Congress" (emphasis added), and that no such conveyance will in any event be valid without prior approval of the Secretary of the Interior. The section thus declares what has long been settled law, that only Congress may authorize an alienation of

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[5] F.C. Wilson to C.H. Burke, Dec. 18, 1923, Gen. Services Files 45918-1921-013, Pt. 8. This letter was located in government archives too late for inclusion in the record below, but it appears to be the only contemporary document dicussing the meaning and purpose of Section 17. Because of that, and because it completely confirms the interpretation of the Section reached by both courts below, the relevant portion of the letter (the complete document is 13 pages, only the first two of which concern the bill) is reproduced in the appendix to this briet, at App. 12 .

any interest of Indian lands,[6] and adds to that a passage underlining the special duties of the Secretary of the Interior in the actual execution of the government's trusteeship over those lands. Nowhere in the writings of Wilson or in any discussion of the Act while it was before Congress was there any suggestion that Section 17 was intended as a grant of power to the Secretary. Its purpose, like that of 25 U.S.C. §177, was to prevent alienation of Indian land except under authority provided by Congress. In what is apparently the only previous case to interpret the section directly, it was viewed in precisely that way. Alonzo v. United States, 249 F.2d 189, 195-196 (10th

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6 See, e.g., cases cited at n. 1, supra. That the section may only have reaffirmed existing law does not render it "meaningless", as Mountain Bell claims. Given the uncertainties of the context, see n. 2, supra, this attempt to clarify the situation was reasonable. Cf. Bryan v. Itasca County, 426 U.S. 373, 391-392 (1976).

Cir. 1957). And see Cohen, supra, n. 1, at 511-512. The recent edition of Cohen, the leading treatise on federal Indian law, specifically cites Section 17 as a statute that "supplement[s] the general restraint on alienation in section 177 ... to prohibit conveyances with respect to particular tribes." Id. at 516, n. 47 and accompanying text.

That Section 17 cannot be read as a broad grant of authority for all kinds of conveyances by Pueblos is conclusively demonstrated by Congress' subsequent actions to provide for acquisition of rights-of-way over Pueblo lands, a lengthy history carefully avoided in Mountain Bell's petition. In 1926 Congress enacted authority for condemnation of Pueblo lands for public purposes, by the Act of May 10, 1926, 44 Stat. 498. After a federal judge held that Act to be defective, Congress passed the Act of April 21, 1928, 45 Stat. 442 (now codified as amended at 25 U.S.C.

§322), which specifically made applicable to the Pueblos the existing federal statutes authorizing grants of rights-of-way over the lands of other Indian tribes.[7] As discussed in Plains Electric Gen. & Trans. Co-Op v. Pueblo of Laguna, 542 F.2d 1375, 1378-1379 (10th Cir. 1976), the legislative history of both Acts reflects Congress' belief that legislation was needed to allow valid rights-of-way to be acquired over Pueblo lands. It is inconceivable that Congress would have enacted two separate statutes to provide for rights-of-way over Pueblo

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7 Those statutes, now codified at 25 U.S.C. §§311-328, had previously been determined not to apply to Pueblo lands by their terms. In Plains Electric Gen. & Trans. Co-Op v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), the Court of Appeals held that the 1928 Act had impliedly repealed the 1926 Condemnation Act (which, under modern authority, would probably have been considered otherwise valid; Plains Electric, 542 F.2d at 1377, n.3).

lands in the four years following the Pueblo Lands Act, if it had already granted complete authority for such conveyances in 1924.

The language of the clause itself, moreover, negates Mountain Bell's argument. It is entirely phrased in the negative, unlike virtually every statute recognized as authority for conveyances of Indian lands, which typically use language stating that the Secretary is "authorized to grant a right-of-way," or similar phraseology. See, e.g., 25 U.S.C. §§311, 312, 319, 321, 323. As this Court said in Bryan v. Itasca County, 426 U.S. 373, 389-390 (1976), comparing a statute alleged to have impaired tribal rights with others that admittedly impaired those rights, "Congress knows well how to express its intent directly." There, the use of express language in the other statutes compelled the negative interence that the statute under consideration did

not have the effect being urged. Such an analysis applies fully here. Congress plainly knows how to bestow authority to grant rights-of-way. It did not do so in Section 17.

Further, in providing authority for grants of rights-of-way over Indian lands, Congress has always been careful to prescribe certain conditions for such grants, or at least to direct the Secretary to promulgate regulations setting conditions. See e.g., 25 U.S.C. §§311-325, 328. Section 17 is devoid of conditions or any directive to the Secretary to establish them, nor does it even limit the type of conveyance allowed. Under Mountain Bell's theory, a Pueblo may, even today, unconditionally sell the whole ranch if only the Secretary can be induced to go along with the transaction.[8]

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[8] In fact, as careful reading of the section

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Congress has never before or since given such despotic power over Indian land to the Secretary, or such untrammeled discretion to any tribe, and there is no reason to believe it did so here.

It is true, as Mountain Bell notes, that the Non-Intercourse Act was not intended to forbid forever all conveyances of Indian land; its intent, rather, was to reserve to Congress complete and exclusive power to regulate such conveyances, and each of the transactions cited in the Petition at p. 14, n.4, was carried out pursuant to subsequently enacted statutory authority (or under provisions of treaties ratified by Congress). Likewise the

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reveals, Mountain Bell's contention would require the absurd conclusion that the section authorizes conveyances of Pueblo land, which is communally held, by "any Pueblo Indian living in a community of Pueblo Indians", with no more than the approval of the Secretary.

Pueblo Lands Act, and especially Section 17, reflects the expectation that conveyances of Pueblo lands would be allowed, but only pursuant to congressional enactment, and under the supervision of the Secretary. As to rights-of-way, the 1928 Act finally realized that expectation.

Mountain Bell's final point in support of its frankly anomalous interpretation of Section 17 is what it somewhat over enthusiastically characterizes as "an established construction" of the Act by the Department of the Interior over a period of 30 years, i.e., from 1926 to 1956. The record with respect to this "established construction" reveals that resort to Section 17 as authority for rights-of-way occurred mainly during the brief period of 1926-1928, before Congress had enacted lawful authority for such

grants.[9]

Thereafter, the hundreds of easements over Pueblo lands by the Bureau of Indian Affairs were routinely approved under lawful authority (i.e., the 1928 and later

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[9] Before 1926, rights-of-way were approved under the general right-of-way statutes, until those were determined to be inapplicable to the Pueblos. See n.7, supra.

Mountain Bell also cites an easement granted to the Bureau of Reclamation in 1956 for a canal. The documents prepared in support of this easement show that Reclamation desired that it be approved under Section 17 to avoid the strictures of Interior Department regulations promulgated under the proper authority, 25 U.S.C. §323, that at that time limited such grants to terms of 50 years. (Reclamation officials then prepared a resolution for the Pueblo's approval, stating that the Pueblo wished to grant the easement "in perpetuity".) This incident reveals the soundness of the decision of the courts below. If Section 17 could be viewed as an unlimited grant of authority to the Secretary or his delegees to approve any conveyances of Pueblo lands without qualification, then all of the carefully considered and drafted conditions imposed by Congress and the Department of the Interior on such grants under 25 U.S.C. §§311-321 and 25 C.F.R. Pt. 169 go out the window. Precisely such abuses gave rise to the interpretation of Section 17 Mountain Bell urges here; there is every reason now to see that they never recur, by letting stand the decisions below.

Acts), with only sporadic (and inexplicable) citation of Section 17. This hardly amounts to "established construction" of the section by Interior.[10] It is also worth recalling that the use of Section 17 to approve easements before Congress passed the 1928 Act was mainly to benefit companies like Mountain Bell, that had constructed lines over Pueblo land unlawfully and suddenly found themselves being sued by the United States under the Pueblo Lands Act procedures. (See Section II, infra.)

Mountain Bell in any event has vastly overstated the significance to be attached to an administrative practice such as that it purports to discern in the record herein. As this Court explained in a recent decision, the rule of deference to

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[10] Or by anyone else. The record shows that in 1929, Mountain Bell itself applied for a second right-of-way across Santa Ana land. The easement was applied for and granted explicitly under the authority of the 1928 Act, not Section 17. R., Supp. Vol. I, 21-24.

an interpretation of a statute by the administrative agency charged with its enforcement "is more appropriately applicable in instances where ... an agency has rendered binding, consistent, official interpretations of its statute over a long period of time." Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27 (1977). And even then, such interpretation, while perhaps entitled to great weight, is "not controlling". United States v. National Ass'n of Securities Dealers, 422 U.S. 694, 719, (1975). And see United States v. Clark, 454 U.S. 555 (1982). Here, there are no binding, consistent or official interpretations of Section 17 by Interior officials, certainly nothing on a par with the S.E.C. rulings discussed in National Ass'n of Securities Dealers or the Civil Service Commission regulations cited in Clark. One regulation of the Interior Department, moreover, indicates that the

Department does not concur in Mountain Bell's interpretation of Section 17. That regulation, 25 C.F.R. §121.22, states that lands owned by an Indian tribe "may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary ..." This is of course fully in keeping with the view of Section 17 taken by the courts below, and its language compares favorably with that of Section 17 itself.

The history of Interior's erratic resort to Section 17, while totally insufficient to merit invocation of the administrative deference rule, does reveal the relatively trivial character of the instant dispute. Mountain Bell notes that about 60 easements were approved under Section 17, but close to half of those have been abandoned or renegotiated or have expired. No one will fail to obtain a right-of-way over Pueblo land as a result of the decisions below. Indeed,

the broad authority Congress enacted in 1928 for grants of rights-of-way over Pueblo lands was considerably expanded in 1948, by the enactment of 25 U.S.C. §323. At the very most, the decisions below may require renegotiation of 30 to 40 old easements, many of them quite small.[11] It is difficult to regard this issue as "an important question of federal law", Rule 17.2(c), R.S.Ct., even in the abstract, and it is manifestly of no consequence whatever to anyone but the handful of Pueblos and companies directly affected by these few remaining easements.

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11 The easement at issue in the instant case, for example, is a 2.9 mile strip only ten feet wide. Mountain Bell has already successfully renegotiated several easements originally approved under Section 17, and has undertaken settlement discussions on others.

Santa Ana understands that two other companies having such easements may seek to file briefs as amici curiae in support of Mountain Bell's petition. While they will undoubtedly predict dire consequences in the event the petition is denied, Santa Ana thinks it noteworthy that only these three companies feel unduly imposed upon by the decisions below.

II. Mountain Bell's Voluntary Dismissal From United States v. Brown Cannot Preclude Consideration Of The Validity Of The Right-Of-Way At Issue Herein.

This Court has, in two recent decisions, Arizona v. California, 460 U.S. 605 (1983), and Nevada v. United States, ___ U.S. ___, 103 S.Ct. 2906 (1983), expressed legitimate concern over efforts by Indian tribes to reopen final court decrees in which issues of land and water rights were fully litigated and decided. Mountain Bell seeks to hop on the coattails of those decisions, arguing that the concerns of finality and repose that guided the Court there have been disregarded in the instant case by the courts below. This is sheer overreaching.

The opinion in Arizona v. California arose from an effort by the United States and the five tribes it represented in an earlier stage of the litigation to reopen

the determination of the tribes' practicably irrigable acreage made by this Court more than 20 years previously. In rejecting the attempt, the Court recounted in some detail the complex and hotly contested litigation that resulted in the earlier decree, and emphasized that issues the parties "'have had a full and fair opportunity to litigate,'" 103 S.Ct. at 1392 (quoting Montana v. United States, 440 U.S. 147, 153-154 (1979)) should be conclusively settled once decided, especially in the sensitive areas of land titles and water rights.

Nevada v. United States was a similar case, another effort by the United States and a tribe to reopen a 40-year-old stream adjudication decree. Again, this Court held that the tribe was bound by the decree, noting that the United States had asserted the tribe's rights fully in the 30-year duration of the earlier proceedings, and reemphasizing the

importance of the finality of a judgment on the merits.

Suffice it to say that none of the considerations that underlie either Arizona v. California or Nevada v. United States is present here. In United States v. Brown there was no litigation of the issue presented here, no decision on the merits, no stipulation or agreement of the parties, no final judgment with respect to Mountain Bell. Indeed, the matter at issue here, the validity of Mountain Bell's Section 17 right-of-way, was not even raised by the pleadings in Brown, and could not have been.

Under the Pueblo Lands Act, the Pueblo Lands Board was to investigate the claims of private parties who had settled on Pueblo lands, to determine whether they met the criteria established by Congress that would entitle them to be given good title to the lands they occupied. Those who obtained favorable decisions from the

Board on their claims automatically got patents. Claimants as to whom the Board decided adversely were named as defendants in suits filed by the United States to quiet each Pueblo's title in the lands the Indian title to which the Board had found was not extinguished. Named defendants could still try to prove to the federal court that they met the criteria of the Act, namely, occupancy under color of title from 1902, or occupancy without color of title from 1889, plus payment of taxes for the requisite period.

United States v. Brown, No. 1814 (Equity) (D.N.M., decree entered May 31, 1929), was the suit brought under the Act on behalf of the Pueblo of Santa Ana. Mountain Bell was one of the many named defendants, inasmuch as the Board had determined that the company could not meet the criteria of the Act, having constructed its telephone line on Santa Ana land after 1902, and without color of

title. The suit was filed on November 27, 1927. Mountain Bell was served on December 14. (R.Supp.Vol. I, 49-55, 10.) It never answered the complaint, or even filed an appearance. Rather, it went directly to the Pueblo in February, 1928, and obtained its agreement to a right-of-way. (R.Supp. Vol. I, 42-47.) In March, 1929, the United States Attorney on the case, Mr. George A.H. Fraser, apparently having heard that Mountain Bell had obtained an agreement with the Pueblo, somewhat apologetically wrote Milton Smith, the company's in-house counsel, inquiring whether the company had in fact secured a right-of-way, and asking to be informed when it had been approved by the Secretary. He added that he would not take a default judgment against the company if he could be satisfied that they had obtained a right-of-way. Mr. Smith responded, saying that the company had already gotten the Pueblo's consent to an

easement, and it was being sent to Washington for approval. Mr. Smith wrote Mr. Fraser again telling him the agreement had been approved, and Fraser promptly prepared a motion and order for dismissal of Mountain Bell from the lawsuit. Judge Neblett signed the one-sentence order the day it was presented, and Mr. Fraser sent Mr. Smith a copy on the same day. (R.Supp. Vol. I, 4-9, 57.)

In attempting to elevate this voluntary dismissal of a non-appearing defendant to the status of a "consent decree", Mountain Bell characterizes the exchange of letters as "an express agreement", and "the parties' contractual agreement." Pet. at 22, 23. It is plain, however, that there was never any binding contract here, or any thought of creating one. Mr. Fraser did not bargain for Mountain Bell to obtain a right-of-way, he merely informed Mr. Smith that if Mountain Bell happened to have gotten one, he would

be glad to forego taking a default judgment. Mountain Bell proceeded to get the Pueblo's consent to an agreement and to obtain Secretarial approval (a procedure the company had followed with respect to several other Pueblos already; R., Supp. Vol. I, 6) before it ever heard from Mr. Fraser; the company clearly did not do it as "a condition of dismissal", or in "compliance" with any "agreement". Pet. at 22.

Even less can the perfunctory order of dismissal be viewed as a "consent decree". As the language of the order itself shows, Mountain Bell's "consent" was not sought, needed, or even mentioned in connection with the dismissal. The United States had an absolute right to dismiss Mountain Bell, even without a court order, and even over Mountain Bell's objection. Ex parte Skinner & Eddy Corp., 265 U.S. 86, 92-94 (1924); Jones v. S.E.C., 298 U.S. 1, 19, 20 (1936). That is all it did here. It

could have cited any reason for the dismissal, or none at all; it might, for example, merely have drafted the order to read, "for good cause shown," and the effect would have been precisely the same. And the decisions of this Court and the courts of appeal are fully consistent with the holding below on this point, that a voluntary dismissal before answer, not stated to be "with prejudice," is without prejudice. McGowan v. Columbia Rivers Packers Ass'n, 245 U.S. 352, 358 (1917). A.B. Dick Co. v. Marr., 197 F.2d 498, 502 (2d Cir. 1952); In re Piper Aircraft Distrib. Sys. Antitrust Litigation, 551 F.2d 213, 219 (8th Cir. 1977).

Mountain Bell attempts to make it appear that its dismissal from Brown was somehow in furtherance of the overall procedures and goals of the Pueblo Lands Act, and should be respected on that ground. On its face, however, the dismissal was obviously an evasion of the

Act's consequences. Mountain Bell could not prove good title under the terms of the Act. Had it been forced to defend its occupancy of Santa Ana land in Brown, it would undoubtedly have lost, as only satisfaction of one of the criteria of Section 4 of the Act would entitle a defendant to a decree in its favor. Instead, Mountain Bell resorted to the contrivance of a right-of-way under Section 17.[12] That right-of-way, even it valid, did not cure Mountain Bell's wrongful occupancy of Santa Ana land from 1907 to 1928; it was, at best, prospective only. The allegations of the complaint in Brown, thus, were not refuted by Mountain

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12 Presumably, under Mountain Bell's theory, any defendant in Brown who could not meet the Act's criteria could evade the Act by getting the Pueblo to sign a deed, and getting the sale approved by the Secretary under Section 17. It is hard to believe that Congress intended to create so vast a loophole in the carefully crafted procedures under the Act, especially after setting out a detailed procedure in Section 16 of the Act under which sales of isolated parcels might take place.

Bell's having gotten the right-of-way, Mountain Bell was merely excused from having to face the consequences. The dismissal order circumvented rather than furthered the goals of the Pueblo Lands Act.

The Act, contrary to Mountain Bell's assertions, was never intended to be a vehicle for resolution of "all Pueblo land claims." Pet. at 23. It was, rather, "an act of grace", Garcia v. United States, 43 F.2d 873, 878 (10th Cir. 1930), strictly for the benefit of those non-Indians whose occupancy of Pueblo lands would otherwise have been found to be unlawful. It was this discrete group of non-Indian claims that the Act hoped to resolve, and it placed the burden of making and proving those claims on the claimants, not the Pueblos. Those who, for whatever reasons, sought to avoid the operation of the Act did so at their peril.

Mountain Bell claims that the

decisions below conflict with various Seventh Circuit and Second Circuit opinions, but the cases cited, Pet. at 24-25, are utterly unlike this one. Each cited decision involved a prior case extensively litigated on its merits, then concluded by a consent decree clearly establishing the rights of the parties, and agreed to by both parties. In Brunswick Corp. v. Chrysler Corp., 408 F.2d 335 (7th Cir. 1969), the consent decree had stated at its conclusion that the action would be dismissed "without prejudice", but the court determined that that language was only intended to preserve the parties' right to enforce the consent decree, and the court thus accorded it res judicata effect in accordance with the prevailing rule. None of the other cases cited by Mountain Bell involved that issue; they merely address the point (irrelevant here) of the res judicata effect of consent decrees that

settle cases on their merits.

The only case cited by Mountain Bell that bears any resemblance to the instant one is the decision it tries to avoid, and that the court below relied on, National Life & Accident Insurance Co. v. Parkinson, 136 F.2d 506 (10th Cir. 1943). There, a receiver applied to the county commission to reduce the assessed value and the amount of unpaid back taxes on a piece of property. The commission declined, and the receiver appealed to the district court under the relevant statute. While the appeal was pending, the commission agreed to make the requested reductions, and the receiver paid the reduced taxes. The receiver asked the court to dismiss the appeal, which it did, in an order worded very much like the dismissal order in U.S. v. Brown, saying, "... it appearing to the court that" the taxes had been adjusted and paid as adjusted, etc. Subsequently, the Oklahoma

Supreme Court ruled that the statute under which the commission had reduced the tax assessment was invalid, and that all actions taken thereunder were void. In the subsequent litigation that reached the Tenth Circuit, the appellant (mortgagee of the property) contended that even if the action of the county commission were void, its recitation in the order of dismissal was nonetheless conclusive as to whether the taxes assessed against the property had been paid. The Tenth Circuit's reasoning there speaks directly to this case:

> ... we do not think that the order of the District Court merely consenting to the withdrawal of the appeal ... rises to the dignity of a consent judgment or dismissal on the merits ... [J]urisdiction was not exercised on any issue on the merits, and the order does not operate to adjudicate any issues raised by the appeal. Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked.

136 F.2d at 509.[13] What occurred in Parkinson is precisely what occurred here: at a very early stage in the court proceeding, circumstances changed, vitiating the need to prosecute, as a result of which the plaintiff dismissed the matter voluntarily with the court's concurrence. In such a situation, the order of dismissal is no more an adjudication of the legal effect of the new circumstances that caused the matter to be dismissed than it is a decision on the merits of the original controversy.

There having been nothing remotely resembling a final order or decree on the merits of the question of validity of Mountain Bell's new right-of-way, and clearly no litigation of that issue, no doctrine of preclusion can operate to bar

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[13] Mountain Bell tries to distinguish this case by claiming that it "plainly rested" on the lack of jurisdiction of the district court, but that issue, if present at all, is in fact nowhere discussed in the opinion.

this action, nor are the important policies underlying the rules of preclusion implicated in any respect. Should Mountain Bell's argument prevail, however, and the innocuous order here be given preclusive effect, the ability of a plaintiff to dismiss a party voluntarily without losing the right to revive the action against that party at a later time would be severely compromised, and the portion of Rule 41, F.R.Civ.P., stating that a voluntary dismissal, unless otherwise stated, "is without prejudice," will have to be rewritten.[14]

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[14] Rule 41 has been described as being "declaratory of a long established practice in the courts". Home Owners Loan Corp., v. Huffman, 134 F.2d 314, 317 (8th Cir. 1943).

CONCLUSION

For the foregoing reasons, Respondent Pueblo of Santa Ana respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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September 12, 1984

APPENDIX

Santa Fe, N.M.
February 27, 1926
c/o Pueblo Lands Board

United States as guardian of the Pueblo of Jemez, v. Santa Fe Northwestern Ry. Co.

The Attorney General,

Washington, D.C.

Sir:

This is one of the suits to quiet title following the report of the Pueblo Lands Board. It is at issue and could be tried at any time when a Federal Judge is available. There has recently occurred a new development, however.

This railroad was started as a private logging railroad, but has more or less developed until it is now about 40 miles long and has been recognized as a common carrier by the Interstate Commerce Commission. A further extension of 20 miles is being arranged, and it is locally hoped and expected that still further extensions will be made and that the road

will be a valuable agency in developing the state.

Its right-of-way crosses not only Jemez but three other Pueblos, and was obtained in each case under the 1899 Act: U.S. Compiled Statutes, Section 4181, et. seq. The Pueblo Lands Board concluded that this Act was not broad enough to cover lands owned in fee by the Pueblo Indians and reported that the title to the land occupied by the Railway remained unextinguished in the Indians, subject to the easement of right-of-way, if any valid easement had been actually acquired. I agreed with the Board in believing that the Act of 1899 did not cover in this case. For this reason, and under the express requirements of the Pueblo Lands Act, a suit to quiet title became inevitable. You will find a discussion, both of the facts and law, in my letters of November 4th and November 27, 1925, to you.

It now transpires that at the time the suit was filed, viz: about January 8, 1926, the White Pine Lumber Company, which is practically identical with the Railway Company, was negotiating a loan of over a million dollars to be secured by a bond issue covering properties, as I understand it, both of the Lumber Company and of the Railway Company, the proceeds to be used for further development work. The suit evidently came as a great surprise to the Railway Company, which had apparently not studied the Act of 1899 carefully and which, having fully complied with all the requirements of the Department of the Interior, believed its title to be sound. The bond houses in Chicago, which were preparing to underwrite the bond issue, immediately took cognizance of the situation, and after some correspondence a conference was had here yesterday, at their request. There were present, Governor H. J. Hagerman, who represents

the Secretary of the Interior on the Pueblo Lands Board; Mr. Cochrane, Special Attorney for the Pueblo Indians; Judge Hanna, of Albuquerque, who is attorney for some of the Indian Aid societies and, as well, for local companies desirous of obtaining rights of way for power lines across some of the Pueblos; Mr. Porter, Vice-Prsident of the Railway Company; Judge Hawley, of Chicago, representing the bond houses; and myself. The results of a lengthy discussion may be briefly summarized thus:

1. The Railway and Bond house representatives could not offer any plausible defense to the suit. In other words, while they would not admit that the Act of 1899 was inapplicable, it was quite clear that they felt such to be the case.

2. It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more

favored position than other Indians or than white men, so as to be able to prevent railways, telegraph and telephone and power lines, etc. from crossing their grants. It also seemed fairly clear that this Railway has been a benefit rather than a detriment to the Jemez pueblo, being of some value to the Indians for transportation, and affording employment to a number of them. As above stated, this enterprise is favorably regarded in New Mexico as an existing agency of development which promises to be increasingly valuable to the state.

3. It was therefore felt that the government should not interfere with the Railway or its projected laon further than duty absolutely required, and there was much discussion as to how the right-of-way could be legalized. One alternative is offered by Section 17 of the Pueblo Lands Act, reading:

"Sec. 17. No right, title, or

> interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This section presents one of the numerous puzzles offered by the Act. At first reading the two halves of the section seem contradictory; the first saying that no title to the Pueblo Lands shall be acquired except under subsequent legislation by Congress, and the second half saying, in effect, that conveyance by Pueblos, or individuals thereof, may be valid if approved by the Secretary of the Interior. We concluded, however, that the two halves might be harmonized by construing the first to mean that no title

could be adversely acquired except under subsequent acts of Congress, and the second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary. Like so many other feature [sic] of this Act, the foregoing construction cannot be considered certain, but seems reasonable.

Since the conference, defendant's representatives have announced a purpose of immediately approaching the Secretary of the Interior in an attempt to agree upon a form of deed acceptable to him, which they will then try to have executed by the Pueblo authorities, and returned to Washington for approval. If all this succeeds, the bonding houses will apparently be willing to make the proposed loan.

In any effort to procure a conveyance from the Pueblo, the Company will doubtless be met with a demand for

additional compensation. I have heretofore expressed a doubt whether the damages already paid are adequate, and if the general scheme is approved, the question of increased compensation will be looked into by the Special Attorney for the Pueblo Indians. You will note that Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall <u>not</u> be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it unfortunate if the Pueblo corporations -- and still more the individual Indians -- are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. However, in the present instance the railway is already constructed and cannot well be got

rid of; it has paid a considerable sum (nearly $3,000 to Jemez Pueblo) as damages; it appears to be a public benefit; and if it deems this method of curing its title sufficient, and can bring it about, I think the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17.

4. In the long run, I believe that the only certain way of rectifying the general situation is by Act of Congress. It is fair that the Pueblos should be subject to the acquisition of rights of way for public utilities of all sorts, just as other Indians are, on payment of just compensation. It was suggested at the conference that it would not be difficult to frame an Act making the provisions of U.S. Compiled Statutes, Section 4181, et. seq., applicable to the Pueblos; but defendant has apparently decided to try the other course first.

5. One result of all the foregoing is

that the Railway Company would like the suit to lie dormant until they can make an attempt to validate their title by one or the other of the above methods. If either should succeed, the controversy would become moot and the suit could be dismissed. They are naturally reluctant to run the risk of a judgment declaring in effect that they are trespassers, and call attention to their good faith and to the prima facie validity of the permit of the Secretary under which they acted. They also promise immediate action in the way above indicated, and obviously they cannot hope otherwise to obtain their loan.

I therefore ask authority to suspend proceedings in this suit for a reasonable time, until we see what they can accomplish.

I understand that Governor Hagerman and Mr. Cochrane agree with my views as to the desirability of assisting rather than thwarting the railway project, and that

the former will so report to the Department of the Interior.

Respectfully,

s/GEO. A. H. FRASER

Special Assistant to
the Attorney General

WILSON AND PERRY
Attorneys at Law
Salmon Building
Santa Fe, N.M.

December 18, 1923.

Hon. Chas. H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

Dear Mr. Commissioner:

Referring to your letter of the 12th inst., I would like to call your attention to the fact that Section 17 of the Bill is, we think the shortest way to prevent present conditions from recurring or existing again. Please look that section over and see if you do not agree with us upon that point. This section is intended to cover the same ground as Section 2116 of the Revised Statutes but it is changed so as to accord with the conditions of the Pueblo Indians.

Section 18 of the proposed legislation covers the same ground as Section 2118 and

Section 2117 of the Revised Statutes except that the penalties in each instance have been doubled.

Section 19 is intended to cover the same ground as Section 2145 of the Revised Statutes excluding certain provisions applicable to Indian country which would not be appropriate for the government of Pueblo land grants by your office.

These three sections are therefore not new but have precedent in the Revised Statutes mentioned applicable to other Indians, the last one mentioned putting into effect a criminal code as is in effect in other Indian reservations with the exception of the sections noted.

As to the rest of the new provisions, they are for the most part for the purpose of making of the Commission created by the bill, a body capable of finding facts upon which future action can be taken whether by Congress or by the Secretary of the Interior.

. . . [Here follows a lengthy discussion of a brief Wilson had received on an unrelated issue.] . . .

Sincerely yours,

/s/

Francis F. Wilson